92-1317

Supreme Court, U.S.
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No.

in the Supreme Court of the United States

October Term, 1992

JOHN J. BOYLE,

Petitioner,

vs.

LOUISE SCHMITT, As Ancillary Personal Representative of the Estate of BLANCHE E. BOYLE, deceased, and LOUISE SCHMITT individually,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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QUESTION PRESENTED

Whether a state court appellate decision violates the Due Process Clause of the 14th Amendment to the United States Constitution where that decision is embodied in a written opinion that expressly decides the case upon propositions of fact excluded at the trial and concerning which the aggrieved party had no occasion or proper opportunity to introduce evidence.

LIST OF PARTIES

The names of all parties in the Florida appellate court whose decision is sought to be reviewed appear in the caption of this case and are named as they appeared below.

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vs.

LOUISE SCHMITT, As Ancillary Personal Representative of the Estate of BLANCHE E. BOYLE, deceased, and LOUISE SCHMITT individually,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITION FOR WRIT OF CERTIORARI

The petitioner, John J. Boyle, respectfully asks that a writ of certiorari issue to review the decision of the District Court of Appeal of Florida, Third District, entered in this cause on July 14, 1992.

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, Third District, is reported at 602 So.2d 665 (Fla. 3rd DCA 1992), and is reprinted in the appendix hereto, page 1a, *infra*.

The unreported memorandum decision of the Florida Supreme Court declining to accept jurisdiction of this cause is reprinted in the appendix hereto, page 7a, *infra*.

STATEMENT OF JURISDICTION

The decision of the District Court of Appeal of Florida, Third District, was entered on July 14, 1992, affirming the trial court judgment against petitioner of February 19, 1992. The Supreme Court of Florida declined jurisdiction of a timely petition for discretionary review on November 12, 1992. The jurisdiction of this court is invoked under 28 USC §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in this case is as follows:

"[N]or shall any State deprive any person of life, liberty, or property without due process of law." Due Process Clause, 14th Amendment, Section 1, United States Constitution.

STATEMENT OF THE CASE

Petitioner's parents James J. Boyle and respondent Blanche E. Boyle entered into a mutual will contract in 1979 agreeing to leave the bulk of their testamentary estates to petitioner. The mother died in 1989, leaving her entire estate by will to respondent Louise Schmitt, petitioner's sister.

Petitioner filed suit against respondent estate to enforce the will contract and against respondent sister as recipient of an inter vivos transfer of $500,000. made by the mother just before she died and allegedly made in fraud of the mother's will contract obligation to petitioner. Record, 56.

Respondents answered raising two groups of defenses: legal defenses challenging whether the contract was formed and subsequently rescinded, and equitable defenses alleging fraud, unconscionability of contract terms, and unclean hands by petitioner. Record, 68. The essence of the equitable defenses was that the petitioner had fraudulently induced his mother to execute the contract by abusing her confidence and had subsequently abused his mother by depriving her of normal love and affection, destroying her marriage with the father, and by representing the father in his divorce action against the mother, all of which were allegedly designed to cause the mother psychological harm.

At the pretrial conference petitioner represented to the court that he could present his case in chief in 90 minutes. Respondents stated they would need five days of trial time to present all of their defenses, particularly the equitable defenses. The trial court bifurcated the trial in its pretrial order. Record 116. A three-hour trial was set to hear the petitioner's case in chief and was limited to the presentation of those legal defenses for which the respondents would require the least amount of time: the defenses challenging the execution of the contract, arguing the "unilateral rescission" of the contract, and arguing the mutual rescission of the contract. The second half of the trial, if needed, would be scheduled for a later date and would give the respondents a full opportunity to develop their equitable defenses.

At trial, the judge limited the petitioner to a presentation of his claim against respondent estate and took no evidence on petitioner's claim against respondent sister

individually, reserving that presentation for a later time, if needed. Transcript of Proceedings, 66, 67. At the conclusion of the three-hour session, the trial judge ruled in favor of respondents without reciting findings of fact or conclusions of law, and stating merely that he had found the respondents' arguments more persuasive than the petitioner's. Transcript of Proceedings, 118.

Petitioner timely appealed the trial court decision to the District Court of Appeal of Florida, Third District, and argued that the trial court had misapplied Florida law to the established facts. In their answer brief, respondents defended their position at trial but added the following argument injecting the equitable defenses which had been precluded at trial:

> In the case at bar, at the time the alleged contract was made the son was, to all appearances, a loving and dutiful son who was helping his parents manage their apartments. It was natural for both of his parents to regard him as a natural object of their bounty.
>
> Nine years later, however, the situation had changed. The son had turned against his mother and sided with his father in what ultimately amounted to nine civil actions in which the father sought to divorce the mother and to grab all of the wealth of the parties, leaving the mother with a small pittance to live out the remaining years of her life.
>
> Such unnatural behavior should not be rewarded and the mother should be allowed to rescind any bequests to her traitorous son. Brief Of Appellee, 7, 8.

The answer brief further compared the petitioner to a television evangelist named in a mutual will contract as third party beneficiary and whose immorality should not merit the benefit of the will contract; and to a faithless secretary or nurse named as third party beneficiary, but who encourages the divorce of the contracting spouses in order to marry the husband and who should not merit the benefit of the will contract. Brief of Appellee, 8.

In his reply brief petitioner pointed out to the state appellate court that the above quote and arguments were an attempt by respondents to argue those equitable defenses that had been precluded at trial. Appellant's Reply Brief, 13.

The state appellate court affirmed the trial court, holding that the mutual will contract was unilaterally revocable by the mother, and that the parents had mutually rescinded the contract in any event. The appellate court then stated as follows:

> Any other result would be harsh and inequitable, particularly in light of John Boyle's conduct against his mother following her move to California. *Boyle v. Schmitt*, 602 So.2d 665, 668 (Fla. 3rd DCA 1992). Appendix, page 6a.

No matter had been raised at the trial — neither evidence nor argument — concerning petitioner's conduct toward his mother. Up to this point in the litigation, no federal question had arisen. But the state appellate court's above statement said in effect that the court could arrive at no other decision when it considered the equitable defenses, the very matters that had been precluded at trial. A federal question of procedural due process under the 14th Amendment now arose unexpectedly and for the first time.

Florida appellate practice barred petitioner from moving for rehearing of the appellate court's decision. He sought discretionary review in the Florida Supreme Court, but that court's jurisdiction was limited in this case to a review of whether the opinion of the district court of appeal expressly and directly conflicted with decisions of the Florida Supreme Court or other Florida district courts of appeal on the same point of law: and that point of law was whether a will contract is unilaterally revocable in Florida. There was no jurisdiction to entertain a due process argument that had arisen in this manner and which did not result from an express construction of the federal constitution. When the Florida Supreme Court declined jurisdiction, petitioner was barred by Florida appellate practice from moving for rehearing of that decision as well.

Hence the federal question arose late in the proceedings because of surprise action by the state appellate court. Florida appellate procedure afforded petitioner no opportunity to specially set up this federal question thereafter.

ARGUMENT

A. THE FEDERAL QUESTION WAS PRESERVED

The right to present evidence is essential to the fair hearing required by the Due Process Clause. *Jenkins v. McKeithen*, 395 U.S. 411, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969). In *Saunders v. Shaw*, 244 U.S. 317, 37 S.Ct. 638, 61 L.Ed. 1163 (1917), plaintiff sought to enjoin collection of a drainage tax. His proffered evidence that his land was an island and could not benefit from the tax was excluded. The defendant prevailed. On appeal the state appellate court reversed upon a holding that the land could not benefit from the tax. The Supreme Court reversed, holding that it was a violation of due process of law for the state appellate court to rule upon a proposition of fact that was excluded at trial

and concerning which the aggrieved party therefore had no occasion or opportunity to introduce rebuttal evidence.

In the instant case the trial judge precluded evidence on the respondents' allegations of petitioner's equitable misconduct in an effort to conserve trial time. The Florida 3rd District Court of Appeal affirmed the trial court's judgment against petitioner upon a holding that it could reach no other conclusion in light of petitioner's equitable misconduct. The appellate court expressly ruled against petitioner on the basis of respondents' allegations of equitable misconduct in the absence of any evidence at trial to substantiate those allegations. Petitioner had no occasion or opportunity to present evidence to rebut those allegations at the trial.

This denial of due process of law — the federal question — arose unexpectedly and for the first time in the appellate court's opinion. Petitioner "was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance." *Saunders v. Shaw*, *supra*, 320. The Supreme Court has held that a federal question has been adequately presented even though not raised in lower state courts when the highest state court renders a decision the grounds of which supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930); *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313, 50 S.Ct. 326, 74 L.Ed. 870 (1930); *Saunders v. Shaw*, *supra*.

Here the highest state court was the 3rd District Court of Appeal, since review in the Florida Supreme Court was discretionary only and was declined. See *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 74 S.Ct. 396, 98 L.Ed. 583 (1954). The jurisdiction of the Florida

Supreme Court is set out in Article V, §3(b), Florida Constitution. Subsection (3) thereof allows discretionary review of a lower court decision that expressly construes a provision of the federal constitution. No express construction of the Due Process Clause was present in this case. It also allows discretionary review of an express and direct conflict with other Florida appellate decisions on the same question of law: which petitioner sought unsuccessfully on the question of whether will contracts are unilaterally revocable. The Florida Supreme Court had no jurisdiction to review the question of whether the state appellate court had denied petitioner due process by an unexpected consideration of evidence precluded at trial, nor was review permitted on any other basis under the Florida Constitution.

Once the grounds of the state appellate decision supplied a basis for asserting the federal right, petitioner was obliged to specially set up the federal question at the first opportunity. Such opportunity may present itself on a motion for rehearing of the state appellate court decision, as in *Brinkerhoff-Faris*, *supra*. It is not the motion for rehearing that is critical, but that petitioner seize the first opportunity to set up the federal question after it arises. Petitioner had already argued to the state appellate court in his reply brief that the trial court could not possibly have relied on the excluded equitable defenses. When it became apparent that the appellate court itself did rely on the excluded equitable defenses, was there an opportunity for petitioner to argue a violation of the Due Process Clause in a motion for rehearing?

Rule 9.330(a), Florida Rules of Appellate Procedure, states that a motion for rehearing, ". . . shall state with particularity the points of law or fact which the court has overlooked or misapprehended. The motion shall not reargue the merits of the court's order." Counsel who used a motion for rehearing to reargue points argued in his brief

was scolded in *Parker v. Baker*, 499 So.2d 843 (Fla. 2nd DCA 1986), for violating that rule. Where counsel's motion for rehearing reargued matters that had been argued before and did so in an abrasive manner, he was turned over to the state bar association for disciplinary proceedings in *Patton v. State Department of HRS*, 597 So.2d 302 (Fla. 2nd DCA 1991).

In *Brinkerhoff-Faris, supra*, the aggrieved party moved for rehearing of the state appellate decision and injected the federal question by reasserting its claims on the merits — a procedure that apparently was permitted under Missouri state rules. Here the petitioner could not have injected the federal question into a motion for rehearing without rearguing the point already argued in his reply brief: that the trial court had not relied on the excluded equitable defenses, and neither should the appellate court. A motion for rehearing would have required petitioner to engage in ". . . a joinder of issue with the court as to the correctness of its conclusions upon points [already argued]." *Parker v. Baker, supra*, 847. An attempt to set up the federal question in a motion for rehearing would have required petitioner to violate the command of the Florida appellate rule.

The decision of the state appellate court was a panel decision. A motion for rehearing *en banc* in Florida is discretionary only and must be predicated upon a motion for rehearing directed to the panel deciding the appeal. Rule 9.331(c)(1), Florida Rules of Appellate Procedure. As noted above, such motion for rehearing would have been improper under Florida appellate practice. See also *Local 174, Teamsters, etc. v. Lucas Flour Company*, 369 U.S. 95, 82 S.Ct. 571, 7 L.Ed.2d 593 (1962).

Petitioner had no further opportunity to set up the federal question. The Florida Supreme Court's jurisdictional restrictions barred the Due Process argument on a petition

for discretionary review. And no rehearing of that court's decision to decline discretionary jurisdiction is permitted. Rule 9.330(d), Florida Rules of Appellate Procedure.

B. INADEQUACY OF STATE GROUNDS

At trial petitioner presented proof that the will contract had been executed by the parents and repudiated by the mother. The defenses tried were that the contract had not been signed by the mother; that if executed, the contract should be unilaterally revocable; and that the contract was mutually revoked by the parents.

On review the state appellate court held that the contract had been executed: "In 1979, James and Blanche Boyle, husband and wife, executed a document entitled 'Agreement to Make Will.'" Appendix, page 1a.

The main body of the state opinion is devoted to an explanation of the holding that the mutual will contract should be unilaterally revocable upon notice communicated to the other contracting party and the third party beneficiary. The opinion declares that the factual situation is unique to Florida law, and it draws primarily on out of state decisions to justify its conclusion that the contract is unilaterally revocable.

In a footnote at the end of the opinion, the appellate court holds that, even before the mother repudiated the contract, both parents had mutually revoked it in the form of a series of mutual and individual wills executed after the contract. All of the subject instruments, the will contract and the subsequent wills, were admitted into evidence as exhibits for both parties without objection. The interpretation of their terms was a matter of law for the court, and the standard of review in the state appellate court was whether the trial court had misapplied Florida law to

the established facts. See *Holland v. Gross*, 89 So.2d 255 (Fla. 1956).

Hence, whether the state grounds are adequate to support the appellate court's decision turns upon whether that court's explanation of Florida law is "plainly untenable", whether it is "so certainly unfounded that it properly may be regarded as essentially arbitrary", whether the purported nonfederal grounds put forward rest upon a substantial basis or are illusory. *Ward v. Board of County Commissioners*, 253 U.S. 17, 40 S.Ct. 419, 64 L.Ed. 751 (1930); *Enterprise Irrigation District v. Farmers Mutual Canal Company*, 243 U.S. 157, 37 S.Ct. 318, 61 L.Ed. 644 (1917); *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276, 52 S.Ct. 556, 76 L.Ed. 1102 (1932). It is within the province of the Supreme Court to enquire into the adequacy of the purported state grounds for the decision below, *Lawrence v. State Tax Commission of Mississippi*, *supra*, and to examine state decisions in making that enquiry. See *Staub v. Baxley*, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958); *Texas v. Brown*, 460 U.S. 730, 732, n.2, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983).

1. ALLEGED UNILATERAL REVOCABILITY OF A WILL CONTRACT

As to the court's declaration that no Florida court had been presented with a repudiation of a mutual will contract by a living promisor, the court simply ignored the whole body of Florida contract and will contract case decisions.

It is the rule of general contract law in Florida that "one party to a contract cannot by himself rescind it." *Cox v. Grose*, 97 Fla. 848, 122 So. 513, 515 (1929). The repudiation of a contract by a party thereto before his time for performance has arrived is a breach of contract by anticipatory repudiation. *Hospital Mortgage Group v. First*

Prudential Development Corp., 411 So.2d 181 (Fla. 1982). Will contracts are treated according to the same principles as all other contracts. *Exchange National Bank of Tampa v. Bryan*, 122 Fla. 479, 165 So. 685 (1936). One party to a will contract cannot by himself rescind it. *Johnson v. Girtman*, 542 So.2d 1033 (Fla. 3rd DCA 1989); *In Re Estate of Shepherd*, 130 So.2d 888 (Fla. 2nd DCA 1961); *Somogyi v. Marosites*, 389 So.2d 244 (Fla. 5th DCA 1980). A will contract is irrevocable even though it does not contain a prohibition against revocation. *Keith v. Culp*, 111 So.2d 278 (Fla. 1st DCA 1959). In *Briggs v. Fitzpatrick*, 79 So.2d 848 (Fla. 1955), it was said that the period of limitations begins to run on a claim for breach of a will contract when one of the living parties repudiates it, not as of the later time of the death of that party.

For the enforceability of a contract, Florida makes no distinction between unilateral and bilateral performances, no distinction between a repudiation that occurs in an executory contract and in one that has been partially executed. Co-promisors are legally bound to their agreement where, in an *executory* contract, there are mutual promises exchanged between them for a future performance. *Jenkins v. City Ice & Fuel Co.*, 118 Fla. 795, 160 So. 215 (1935). That mutual exchange of promises is the consideration which makes the will contract binding. *Ugent v. Boehmke*, 123 So.2d 387 (Fla. 3rd DCA 1960). Where a will contract is repudiated by one party thereto during the lifetimes of both contracting parties, the contract will be enforced against the breaching party. *Donnelly v. Mann*, 68 So.2d 584 (Fla. 1953); *Farrington v. Richardson*, 153 Fla. 907, 16 So.2d 158 (1944); *Robinson v. Malik*, 115 So.2d 702 (Fla. 3rd DCA 1959).

In the state appellate opinion below, see appendix, page 4a, the court cited *Donner v. Donner*, 302 So.2d 452 (Fla. 3rd DCA 1974), for the proposition that a will contract *may* be irrevocable and said further that the will contract in the

instant case would not become a fixed obligation on the mother until her death. On the contrary, the *Donner* decision actually held that the will contract became binding and irrevocable when it was signed by the living promisors. *Id.*, 456. The court there expressly rejected the contention that the contract obligation would not ripen until the death of one of the promisors. *Id.*, 455, 459.

In a prior appeal between the parties to this action, the same state appellate court held that an allegation of an inter vivos transfer by one of the co-promisors to a will contract in fraud of the beneficiary's interest under the contract would state a cause of action for breach of the will contract, *Boyle v. Schmitt*, 578 So.2d 367 (Fla. 3rd DCA 1991), *rev. den.*, 587 So.2d 1329 (Fla. 1991).

Under Florida law a donee third party beneficiary of a will contract has a right to compel either promisor to fulfill his contractual obligation. *In Re Estate of Rosenstein*, 326 So.2d 239 (Fla. 3rd DCA 1976).

The state appellate court ignored this body of Florida law on will contracts, stating in effect that it was non-existent. Instead it drew on non-Florida case decisions to support its holding. But none of those decisions is apposite to its reasoning. For example, the court quoted from *Allen v. Dillard*, 15 Wash.2d 35, 129 P.2d 813, 820–821 (1942), for the proposition that a will contract is unilaterally revocable. It ignored the holding in that case, appearing at page 824 of the opinion therein, that the mere execution of mutual wills without more does not create a will contract. At page 820 of the decision, just preceding the quoted material, the Washington court said that wills are revocable, will contracts are not.

It appears that the state appellate court drew upon precedent unfamiliar to the Florida bench and bar as a

pretext to justify its foregone determination that petitioner was guilty of equitable misconduct, especially in view of its conclusion that, *"Any other result"*, would be harsh and inequitable.

2. ALLEGED MUTUAL RESCISSION OF THE WILL CONTRACT

Under the original terms of the will contract executed in 1979, the parents agreed to leave the bulk of their estates directly to petitioner. They executed several joint and mutual wills thereafter, each varying the terms of their testamentary arrangement somewhat for estate tax purposes. Transcript of Proceedings, 37–43. Each subsequent mutual instrument provided that the estate of the decedent parent would go to the surviving parent and upon the survivor's death, the bulk of the remainder would go to the petitioner. See appendix, page 2a. Each such modification was irrelevant to the basic obligation of the will contract in favor of the petitioner.

A will contract can be modified by mutual agreement of the contracting parties in whatever form they wish. *In Re Estate of Algar*, 383 So.2d 676 (Fla. 5th DCA 1980). A mutual will contract executed between parents providing that their estates shall go to the survivor of them both with the remainder to their son upon the death of the survivor is a binding and enforceable obligation. *Ugent v. Boehmke*, *supra*; *In Re Estate of Rosenstein*, *supra*; *Weiss v. Storm*, 126 So.2d 295 (Fla. 1st DCA 1961).

The parents also executed individual wills, which were admitted as exhibits at trial. Some of the mother's individual wills attempted to abrogate her contractual provision for the petitioner. To the extent that the individual will of a co-promisor to a will contract is inconsistent with the contract terms, it is that party's

unilateral act and is powerless to vary the contract terms. *Johnson v. Girtman, supra.*

The state appellate court's interpretation of the plain contract terms of the testamentary exhibits ignored the provision that each instrument declared leaving the remainder of the parents' estates to the petitioner. There was no instrument in evidence, as implied by the court's footnote 5 at appendix, page 6a, in which the parents mutually revoked the will contract. The appellate court's conclusion that the parents had mutually revoked the contract through those instruments finds no support in the evidence and is untenable under Florida law.

Parenthetically, assume for the sake of argument that the state appellate court correctly held that the parents had mutually revoked the will contract through these subsequent instruments. Such a holding would have been dispositive of the appeal. Why did the court indulge in the lengthy, and apparently gratuitous, dicta concerning the unilateral revocability of the will contract if that were the case? It would seem that the holding on unilateral revocability was a pretext to bolster the inadequate basis for the court's holding on mutual rescission of the will contract and an attempt to justify the actual basis for the decision: that the court was persuaded by respondents' unsupported charge of equitable misconduct.

This court should assume jurisdiction of this cause to correct the denial of procedural due process herein, a denial which the state appellate court has sought to mask with arguments that have no basis in Florida law.

CONCLUSION

The District Court of Appeal of Florida, Third District, expressly decided this case on the basis of an allegation of equitable misconduct for which there was no evidence offered or admitted at trial, any evidence thereon having been precluded by the trial court's pretrial order. It did so in violation of the Due Process Clause of the 14th Amendment to the United States Constitution. The state grounds expressed in the court's opinion to justify that denial of due process are so plainly untenable under Florida law as to be essentially arbitrary and pretextual.

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Appendix

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1992

CASE NO. 92-410

JOHN J. BOYLE,

Appellant,

vs.

LOUISE SCHMITT, etc., et al.,

Appellees.

Opinion filed July 14, 1992.

An Appeal from the Circuit Court for Dade County, Jon I. Gordon, Judge.

John J. Boyle, in proper person.

Robert M. Brake, for appellees.

Before SCHWARTZ, C.J., BARKDULL, and JORGENSON, JJ.

JORGENSON, Judge.

John Boyle appeals from a final judgment denying recovery in an action for breach of a contract to make a will. We affirm.

In 1979, James and Blanche Boyle, husband and wife, executed a document entitled "Agreement to Make Will." The agreement provided, in pertinent part, that:

> The parties hereby recite and declare that John J. Boyle, their son, has and is performing services necessary to maintain them in reasonable comfort and dignity by managing and maintaining their real and personal property.
>
> In consideration of the above services, James J. Boyle and Blanche E. Boyle, shall make a Will bequeathing and devising all their property to their son, John J. Boyle, escept [sic] that all their jewelry and household effects at 5895 S.W. 35 Street, Miami, Florida, shall go to their daughter, Louise Schmitt.

Simultaneously with the execution of the will agreement, Blanche and James Boyle executed a joint will in which each left all property to the survivor. Upon the death of the survivor, the property was to go to John Boyle with the exception of jewelry and household effects that were left to the daughter, Louise Schmitt.

During their marriage, the parties refinanced their jointly owned rental properties several times, drawing cash that they invested in municipal bonds. Eventually, the bond interest payments had to be used to meet the mortgage payments on the properties. In 1987, because of family difficulties, Blanche Boyle moved to California to live with her daughter and refused to contribute her share of the bond interest to the debt service on the properties. James Boyle sued for divorce and sought to have a constructive trust imposed on the bonds held by Blanche Boyle.[1] John Boyle, their son and plaintiff in this case, represented his father in the action against his mother. In the divorce proceeding, Blanche Boyle gave a deposition in which she expressly

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[1]The litigation over the bonds resulted in appeals to this court. *See e.g.*, Schmitt v. Boyle, No. 91-2649 (Fla. 3d DCA Apr. 28, 1992); Boyle v. Schmitt, 552 So. 2d 1158 (Fla. 3d DCA 1989).

repudiated the Agreement to Make a Will. She did not remember executing the document and testified that she never would have agreed to leave the bulk of her property to John, effectively disinheriting her daughter and a son by a previous marriage.[2] Blanche Boyle's repudiation of the will agreement was immediately communicated to James Boyle. In addition to representing his father against his mother in the divorce proceeding, John Boyle sued his mother and his father for breach of the agreement to make a will.[3] The son later dismissed the action against his father. When Blanche Boyle died in 1989, she left a will, executed in California in 1988, naming her daughter, Louise Schmitt, as personal representative and sole beneficiary.[4] John Boyle substituted his mother's estate as defendant in the breach of contract action and joined his sister as a party.

We affirm the trial court's judgment and hold that under these circumstances, Blanche Boyle properly revoked the contract to make a will. The third party beneficiary, John Boyle, is therefore not entitled to enforce the terms of that contract against either his sister or his mother's estate.

This court has held that "unlike a will which clearly is ambulatory in nature and therefore may readily be revoked by a competent testator, a contract to make a will *may* be

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[2]John Boyle has stipulated that his mother repudiated the will agreement during the divorce proceeding.

[3]The litigation over the contract to make a will resulted in the following appeals to this court: Schmitt v. Boyle, 591 So. 2d 637 (Fla. 3d DCA 1991) (denial of petition for certiorari seeking review of order denying jury trial); Boyle v. Schmitt, 578 So. 2d 367 (Fla. 3d DCA) (reversal of trial court's orders dismissing two counts of son's complaints), *rev. denied*, 587 So. 2d 1329 (Fla. 1991); Schmitt v. Boyle, 558 So. 2d 1096 (Fla. 3d DCA 1990) (seeking review of orders granting leave to amend); Schmitt v. Boyle, 549 So. 2d 1019 (Fla. 3d DCA 1989) (same).

[4]The will provided in part: "Not being unmindful of my sons, John Boyle, who is now suing me, and Bruce Boyle. . . ."

irrevocable and therefore subject to specific enforcement by the courts." *Donner v. Donner*, 302 So. 2d 452, 455 (Fla. 3d DCA 1974), *cert. denied*, 314 So. 2d 151 (Fla. 1975) (emphasis added; citations omitted). Therefore, "[I]f the promisor breaches his agreement to make a devise or not to revoke a will, the beneficiary of the promise or the improperly revoked will may bring an action to enforce the terms of the agreement." *Johnson v. Girtman*, 542 So. 2d 1033, 1035 (Fla. 3d DCA 1989) (citations omitted). *See also Sharps v. Sharps*, 219 So. 2d 735 (Fla. 3d DCA) ("In a contract to make a will, the promisor has the right to change his will, and . . . the right being enforced against the promisor is the contract right, and not the will. . . ."), *cert. denied*, 225 So. 2d 920 (Fla. 1969); *In re Shepherd's Estate*, 130 So. 2d 888 (Fla. 2d DCA 1961) (mutual wills are ambulatory in nature and may be revoked; contract upon which mutual wills are made may be enforced depending upon circumstances); *Keith v. Culp*, 111 So. 2d 278 (Fla. 1st DCA) (same), *cert. denied*, 114 So. 2d 5 (Fla. 1959).

Until now, no Florida court has been presented with a case such as this, where a party to the agreement to make a will clearly and unequivocally revoked the agreement *prior* to death and communicated that revocation to both the other promisor and the third party beneficiary.

> An agreement to make mutual wills, or the execution of wills in pursuance of such an agreement, does not bind the testators to keep the property, covered thereby, for the intended beneficiaries under such wills, or prevent them from making such other disposition of it, either inter vivos or by will, as they may desire and mutually agree, while both or all are alive. *Moreover, while both or all of the parties to such an agreement are yet alive, any party may recede therefrom, and revoke his will or make a different disposition of*

> *his property, on giving proper notice to the other party or parties of his act in so doing*, or where such other or others have actual knowledge thereof; but a revocation or alteration of his will by one of the parties to such an agreement in secret, or without notice to, or the knowledge of, the other or others, although all are yet alive, does not release such party from his obligations under the agreement, and it remains enforceable against him.

Allen v. Dillard, 15 Wash. 35, ____, 129 P.2d 813, 820-821 (1942) (emphasis added; citations omitted). *See also Mitchell v. Marklund*, 47 Cal. Rptr. 756 (Cal. Dist. Ct. App. 1965) (divorced wife's repudiation of agreement to make a will released former husband of his obligations under agreement, where wife communicated repudiation by her conduct prior to death); *Church of Christ Home for Aged v. Nashville Trust Co.*, 184 Tenn. 629, ____, 202 S.W.2d 178, 181 (1947) ("It cannot be doubted that either party to the agreement [to make a will], while both are still alive, may recede therefrom and make a different disposition of his property upon giving proper notice of his act in doing so.") (citations omitted). *See generally*, 1 *Page On Wills* § 10.2 (3d ed. 1960 & Supp. 1992). In this case, it is undisputed that Blanche Boyle repudiated the agreement to make a will during her lifetime and communicated that revocation both to James Boyle, the other promisor, and to John Boyle, her son and third party beneficiary. Unlike the co-promisors and beneficiaries in the Florida cases construing contracts to make a will, James and John Boyle did not first learn of the repudiation after Blanche Boyle's death through a will that was inconsistent with the terms of the agreement to make a will, but during her lifetime through her unequivocal statements memorialized during her divorce from James Boyle. The reciprocal provisions of a joint will "constitute a contract between the parties *which is revocable by either during their joint lives by the giving of notice to the other*,

becoming a fixed obligation upon the death of either one without such notice." *Awramenko v. Awramenko*, 19 Misc. 2d 877, ____, 192 N.Y.S. 2d 15, 17 (N.Y. Sup. Ct. 1959) (emphasis in original). Blanche Boyle's agreement would not have become a fixed obligation until her death; until then, she was free to repudiate the agreement as long as she gave notice to her former husband and her son. Any other result would be harsh and inequitable, particularly in light of John Boyle's conduct against his mother following her move to California.[5]

In sum, we join those jurisdictions that have adopted the bright line rule that a party to a contract to make a will may repudiate that contract during her lifetime, provided that she gives notice of that repudiation to the co-promisor and the third-party beneficiary.

Affirmed.

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[5]Even if Blanche Boyle had not properly revoked the agreement to make a will, the *mutual revocations* by both parties to the agreement bar enforcement of the agreement to make a will. A contract to make a will may be modified or revoked by mutual agreement of the parties. In re Estate of Algar, 383 So. 2d 676 (Fla. 5th DCA), *rev. denied*, 389 So. 2d 1107 (Fla. 1980). Following the execution of the agreement and the mutual will, Blanche and James Boyle made subsequent wills, some jointly, and some individually. The wills did not conform to the agreement. Through execution of those wills that were inconsistent with their 1979 agreement to make a will, Blanche and James Boyle *both* revoked that agreement even before Blanche Boyle individually repudiated it in June, 1988.

Supreme Court of Florida

THURSDAY, NOVEMBER 12, 1992

DISTRICT COURT OF APPEAL,
3RD DISTRICT NO. 92-410

CASE NO. 80,297

JOHN J. BOYLE,

Petitioner,

v.

LOUISE SCHMITT, ETC., ET AL.

Respondents.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

MCDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur

A True Copy

TEST:

[SEAL]

/s/ Sid J. White
Sid J. White
Clerk, Supreme Court

BH

cc: Hon. Louis J. Spallone, Clerk
Hon. Marshall Ader, Clerk
Hon. Jon I. Gordon, Judge

John J. Boyle, Esquire
Robert M. Brake, Esquire